United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2254

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74 - 2254

VERA PAVLICKA

Plaintiff - Appellant,

- against -

NEW YORK UNIVERSITY MEDICAL CENTER,

Defendant - Appellee.

On Appeal from the United States
District Court for the Southern
District of New York

APPELLEE'S BRIEF

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BRIEF OF APPELLEE

STATEMENT OF FACTS

The defendant was a patient in the hospital of the appellee, having entered said hospital on August 15, 1968 for a re-fusion of the lumbo-sacral area. A prior attempt at a fusion of this latter area had failed. Surgery was performed on August 20, 1968 and, as part of her post-operative treatment, physiotherapy was prescribed. On September 13, 1968, the defendant, as part of the aforementioned therapy, was taken to the physical rehabilitation department of the hospital and placed on a stretcher and lowered into what is known as a "Hubbard Tank", which is a type of whirlpool bath.

The defendant alleged that, while being lifted from the bath by mechanical sling (still lying supine on the stretcher) she was struck on her head behind her right

ear causing her various and sundry injuries.

The plaintiff claimed the incident occurred because one of the two defendants whom she has observed operating the "Hubbard Tank" apparatus on previous visits was absent at the time she was being lifted from said tank and, as a result of this absence, she was struck by the "control box".

The trial before the Hon. John M. Canella and jury commenced on November 8, 1973 and finished on November 14, 1973. The jury rendered a unanimous verdict for the defendant.

ISSUES INVOLVED

1. Was it reversible error for the Court to charge on contributory negligence?

2. Did the Court exhibit a bias which prevented the plaintiff from having a fair trial?

POINT I

THE DEFENDANT CONTENDS THAT THE COURT PROPERLY CHARGED THE JURY ON CONTRIBUTORY NEGLIGENCE

The Court charged the New York law on contributory negligence and remarked in the beginning of its charge that it had discussed the charge with opposing counsel in the afternoon before at the side bar. (App. 551-554) No exception to such charge was taken by either counsel especially not by the plaintiff's counsel. (App. 565)

Thus the charge of the Court becomes the law of the case. The plaintiff cites the case of Bern v. Evans, (C.A. Neb. 1965), 349 F. 2d 282, in support of his contention that the trial judge committed reversible error in charging that contributory negligence could be considered by the jury. In the Bern case, cited supra, the Court quotes as follows at p. 288:

> "... It is clear, therefore, that this objection is precluded from our consideration by virtue of Rule 51, F.R.Civ. P., which provides, inter alia, as follows:
>
> > 'No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.'
>
> "We have previously held this rule to have the force and effect of law. See: Baltimore & O.R.Co. v. Felgenhauer, 8Cir., 168 F. 2d 12, 18; and Mills Owners Mut. Fire Ins. Co. v. Kelly et al., 8 Cir., 151 Fed 2d 763, 765. Also see: Miller et al. v. Brazel, 10 Cir., 300 Fed. 2d 283, 288; and Barron & Holtzoff, Federal Practice and Procedure, Vol. 2B, Sections 1101 to 1106, inclusive, p. 439 et seq."

Also the Court's attention is directed to the Bern case, pps. 288, 289, cited supra, in which the Court discusses contributory negligence and, in its treatise, notes that the plaintiff excepted to the instructions on such issue, thus allowing the Appellate Court to consider the instructions.

Giving or not giving an instruction will not be reviewed without seasonable objection. A party may not stand by without objection to rulings or instructions and then, after verdict and judgment, when it is too late for the District Court to change or correct its rulings or instructions, complain for the first time on appeal that the District Court committed errors. Federal Mut. Implement & Hardware Ins. Co. v. Fairfax Equipment Co., (C.A. Okl. 1958) 261 F. 2d 207; Miller v. Brazel, cited supra; Western Fire Ins. Co. of Fort Scott, Kan. v. Word, (C.C.A. Tex. 1942) 131 F. 2d 541. See also Barney v. Staten Island Rapid Transit Ry. Co., (C.A.N.J. 1963), 316 F. 2d 38, cert. den'd 84 S.Ct. 67, 375 U.S. 826, 11 L. Ed. 2d 58. This rule that no party may claim error in the giving or the failing to give an instruction unless he objects thereto before the jury retires for deliberation of its verdict should be scrupulously complied with. See Conner v. U.S., (C.A. Tex. 1971), 439 F. 2d 974, op. sup. 442 F. 2d 1349.

POINT II

THE DEFENDANT CONTENDS THAT THE TRIAL COURT'S INSTRUCTIONS TO THE JURY MUST BE REVIEWED IN ITS ENTIRETY

The plaintiff cites the case of Mandel v. Pennsylvania Railroad Company, (C.A. N.Y., 1961) 291 F. 2d 433 as an authority for his position that the trial judge in the instant case allowed the jury to determine if there

was negligence to be attributed to the plaintiff when, in his opinion, there was no evidence. In passing, the Court's attention is respectfully directed to the cited decision of May 23, 1961 in which the Court, based on the facts before them, held that the verdict in favor of the plaintiff, Mandel, was affirmed. The Court in its original opinion stated as follows:-

> "... His charge (the trial judge), the relevant portions of which are set out in the margin,[1] was that unless there was evidence of 'extraordinary swaying or jerking or jolting', none of which he himself remembered, the operation of the train was prudent, but that this would not prevent a finding of negligence based on the floor and lighting conditions. It

1. "Now, in determining every one of these facts and the testimony generally, and in giving the weight, you should and must use your common sense, your experience, and we know from experience that every train sways, and comes to a stop.

"The Court has no independent recollection of any testimony as to whether there was any extraordinary swaying or jerking or jolting of this train. Of course, if you find that there was no extraordinary jolting or swaying or jerking of this train, then you should find that the operation of this train, as far as the movement of this train, was prudent and there was no negligence in this particular aspect.

"That does not mean, that if you find an absence of swaying or jerking, that you still cannot find that there was debris or slush and an absence of light that caused the injury."

must be presumed that the jury's verdict was based on negligence thus properly found and not, contrary to the charge, upon extraordinary swaying of which there was no evidence."

Based on the material presented to the Circuit Court on the initial hearing, said Court was correct. It was not until further instructions of the District Court was presented on a petition for a rehearing that the Court changed its opinion. In the case at bar no additional instructions except those in the transcript of the record (Tr. 537-565) were given.

In the case at bar, much is made of that part of the instruction (App. 553-554) in which the trial judge states:

"So here again you must look into the proximate cause because if you find there was negligence on her part, for the sake of argument, suppose in a situation like this you find, and I don't suggest you must and I am only discussing the evidence generally and not in particular importance.

"Suppose for the sake of argument you remember she is sitting back in the chair showing you how it happened and she said it came from her right and she turned her head around and it hit her head.

"Suppose for the sake of argument she sat up into this device. That, of course, would be her own conduct.

"She had been there five or six times before. She knew how the thing worked. She knew what she was supposed to do according to what she said about having been there and she remembers it as being prone on her back at all times.

".....

"I only made the remarks to you to indicate what we mean by contributory negligence where a person adds to or becomes a part of the fault".

It is the respectful contention of the defendant that the example given by the Court in its instruction, quoted above, was not prejudicial nor substantial error, if error at all, and, if error, was clarified by the Court's use of the phrase "for the sake of argument" and the qualification "I don't suggest you must" and the final paragraph of the charge starting with "I only make the remarks etc.".

With regard to this charge, the plaintiff seems to be contending that the above cited part was prejudicial error, yet, again, defendant urges that, in determining whether there was prejudicial error in the giving of this instruction, or, better still, this example, the instructions must be considered as a whole. Hosier v. Chicago & N.W. Ry. Co., (C.A. Ill. 1960), 282 F.2d 639, cert. den'd 81 S.Ct. 695, 365 U.S. 814, 5L.Ed. 2d 693; New Amsterdam Cas. Co. v. Novick Transfer Co., (C.A. Md. 1960), 274 F. 2d 916.

The Court's attention is also directed to the colloquy at the side bar, (App. 565) and the trial court's reply to the plaintiff's objection. The trial court mentions that the record indicates that the Doctor's (Yoslow) description (App. 467-470), (also Dr. Tam's, App. 346) plus

the photograph supplied here with the appendix. (Plaintiff's Exhibit 5 * mentioned in App. 210-213) supports his comments that were objected to by the plaintiff's counsel, Mr. Reilly. The Court's attention is also directed to the plaintiff's own description which supports this disputed analogy of the trial court (220-226).

* Plaintiff's Exhibit 5 in evidence is not available to the defendant. An attempt was made by defendant to obtain said Exhibit from the office of the original counsel to the plaintiff but to no avail. The defendant then contacted the counsel presently representing the plaintiff in this appeal but he professed no knowledge of its present whereabouts. However, he stated that he had no objection to the inclusion of a xerox facsimile of the exhibit in question. This facsimile is included in the appendix but is not marked with the letters of the alphabet placed on the original xerox copy by the plaintiff. It is merely being submitted to show this Court what a Hubbard Tank and its operating mechanism looks like.

POINT III

THE TRIAL JUDGE SHOWED NO BIAS AT ALL AGAINST THE PLAINTIFF

Before discussing the alleged bias of the trial judge, I must object to the statement of the plaintiff's counsel that "She was, no doubt, in pain during her ordeal in Court". This latter statement has no place in an Appellate Court aside from being objectionable in any court.

Now, the plaintiff takes issue with a remark of the trial judge (App. 208-213) in which he used the word "handfuls". It is the contention of the defendant that this remark was taken out of context and was not biased nor prejudicial to the plaintiff. A perusal of the entire transcript would reveal that it was the contention of the defendant that many of her complaints and injuries among other causes, could have arisen from the over-indulgence in Demerol and this contention was supported by medical testimony at the time the trial judge's statement (objected to) was made the defendant had been inquiring in length, to her use of Demerol.

The plaintiff's conclusion that "the heavy sarcasm of the Judge's remark could hardly have been lost on the jury" is certainly an unsubstantiated comment. He was not there, thus cannot state anything concerning the Judge's demeanor nor tone of voice and, thus, cannot state what effect it had on the jury.

Again, plaintiff raises another remark of the Judge (App. 238) which is an attempt at humor directed to the jury. Whether it was funny or not, it was not malicious nor directed to the plaintiff or her suit. The Judge on other occasions made an attempt to lighten the tediousness of the trial, e.g. (Tr.84).

"THE COURT: We will as our friend from Aer Lingus would say, the top of the morning to you.

"JUROR NO.5: * The rest of the day to yourself."

Such harmless attempts to lighten the "heavy seas" of the trial should not be frowned on but treated with tolerance as long as they are within the bounds of good taste and used occasionally. Of course, humor has its place but its frequency should be used with discretion. An examination of the entire record would reveal that it was so used.

Objection is also raised to the remark of the trial judge (addressed to Mr. Reilly, plaintiff's counsel in the District Court) that he (the Judge) wanted her testimony finished before the Court adjourned for the weekend so she would not have to worry about it over the weekend. The word "bug" as used by the trial judge was a

* Juror No. 5 was an employee of AER LINGUS

slang usage and, according to Webster's Third New International Dictionary Unabridged (1971), means "bother, annoy, irritate". It is clear from the context of the trial judge's remark that he meant it in this context and the jury could draw no other inference from the word. The Judge merely stated that he didn't want the plaintiff to be bothered over the weekend about possibly having to take the witness stand again on Monday. The use of the word might be considered indelicate but hardly malacious or biased.

The plaintiff rings in a sleeper referring to a comment of the Trial Judge which the plaintiff refers to as "See also Appendix 442". It is a colloquy between the Court and Mr. Reilly (App. 439-442) in which the Court finally states that he is irritated with Mr. Reilly's conduct of the cross-examination of Dr. Yoslow, a medical witness. To properly judge the cause of the Court's irritation, the entire transcript for the three and a half days preceeding the statement complained of (not only Dr. Yoslow's cross) would have to be examined to determine if the trial judge had good and sufficient reasons for his irritation. The one statement slyly hinted at by the plaintiff is taken out of context and should not be taken as biased towards the plaintiff herself. In fact, the Judge in his charge (App. 537-538) excuses himself to the jury on the "irritation comment". One judge may be more ascerbic than another in handling repetitious or improper

questions of counsel but, of necessity a large latitude must be left within the judgment and judicial discretion of the judge. Rudnick v. Prineville Memorial Hospital, (C.A. Or. 1963), 319 F. 2d 764.

In closing, I can't help but comment on the use of the word "sexist" by the plaintiff in the last paragraph on page 4 of his brief. I can't find the word in a dictionary, even under slang but it is a novel coining of a word and means, no doubt, that the trial judge was what is popularly known in these times a "male chauvinist". I would cite the case of Krosowski v. Greyhound Lines, Inc., (C.A. Ohio 1968), 402 F. 2d 445, 447 in which the Appellate Court comments on the trial court's charge as follows:

> " 'You have had a lot of experience in your life. You observed this driver and heard him talk. Would you figure he was gracious with these ladies or grumpy or grouchy?'
>
> "[The significance of determining whether the bus driver was 'gracious with these ladies' as opposed to being 'grumpy or grouchy' under the Court's rhetorical question would seem well calculated to prejudice at least female members of the jury]"

On the jury in the case before this Court there were, to the best of my recollection, three women and thus, since the plaintiff was a woman, the above cited quote would hardly have any efficacy. Nor did the trial judge's alleged "sexist" remarks have apparently any effect on the verdict against the female plaintiff.

CONCLUSION

THE VERDICT OF THE DISTRICT COURT IN FAVOR OF THE DEFENDANT SHOULD BE AFFIRMED

Respectfully submitted,

MELE AND CULLEN
Attorneys for Appellee

By: _____
John J. Cullen
A Member of the Firm

Dated: Nov. 12, 1974

Q Are you familiar with the equipment in that particular room?

A Yes, sir.

Q Could you describe if you would the tank, what it looks like?

THE COURT: Well, not what it looks like but what it looked like at the time in question.

Q At that time, yes.

A Right. At that time, at this time, it's the same tanks are still used. It is kind of shaped like a butterfly, large enough to put a whole body in, and the people are put in by placing them on a stretcher-type affair which is called a carrier. They are then attached to a lift, brought over the tank, and lowered into the tank. It is like a huge bathtub but it is shaped to allow you to get in close to take care of a patient in it, as opposed to being round where you couldn't reach a patient.

MR. CULLEN: Your Honor, Miss Heustis provided me with a catalog yesterday which shows a picture of the tank and also shows a picture of the mechanism for lowering the stretcher in and out. I have made Xerox copies of that and if anybody wishes to offer them into

evidence --

MR. REILLY: Mr. Cullen, will you wait awhile? I will get to it.

MR. CULLEN: I thought we could expedite thungs if we had pictures.

THE COURT: All right.

Q Would you go on with your description?

A I think that about covers it. It is a butterfly shape. It is big enough to allow a body to be submerged in the tank, everything but the head. The patient normally goes in on a carrier which is a stretcher arrangement made of either canvas or nylon. The stretcher is suspended by four hooks, and the whole thing is lifted into the air by a lift, one similar to what you see in a butcher ship holding a side of beef. It allows you to raise the patient up, slide the patient off and lower the patient into the tank.

Q Is there a control box on that?

A Yes, sir, there is.

Q Where is that control box located?

A Just about right under the housing for the chain which is part of the lift.

Q Would you describe that for us in relation to size if you will?

A It is about eight inches long, and about two and a half inches wide, so it would be like that. It has an up and down switch on it, usually black in color, and it is rubber (indicating) for insulation purposes.

Q What is under the rubber?

A I have never taken one apart.

Q Do you know the weight of it?

A I have never weighed one but I'd say maybe a pound. I have never put one of the scales.

Q Have you measured it since you were examined before trial?

A I measured it today as a matter of fact, because the specifications on the box itself are not mentioned in the catalog.

Q So when you gave an answer that it was six inches long --

A No sir, eight inches.

Q -- four inches wide?

A Eight and two and a half inches.

Q When did you measure it?

A Just before I came over.

Q Is this the same piece of equipment that was there on the date of the accident?

A I can't -- I can't answer that. See sometimes if they --

THE COURT: That is enough. Don't explain anything. How thick is it? You said it is two and a half by eight but how thick?

THE WITNESS: Two and a half all the way around. Two and a half wide, two and a half deep.

THE COURT: And eight inches long?

THE WITNESS: Yes, sir.

Q Do you know who operated the controls on the day of the accident?

A No, sir.

Q Would the incident sheet which is, I think, deemed as part of the hospital record -- and I wonder if for purposes of -- I show you this incident sheet and ask you if that would indicate who was operating the controls on that particular occasion.

A No, sir.

Q Who signed the report?

A Mrs. Peach, senior therapist in the area.

Q And when someone is involved in something like this, do they usually leave out the name of the party who was involved in the incident?

THE COURT: Sustained.

Q Were these tablets in addition to the injections of Demerol that Dr. Mendoza gave you after the accident?

A These Demerol tablets are you saying?

Q You told us before lunch in response to several of my questions, we had a difference of whether they were tablets or pills, that you had taken it in pill or tablet form, I am confused myself now, that you had taken Demerol in a pill or tablet form after the accident. Is that correct?

A Yes.

Q And in addition, you just have told us that some of these needles that Dr. Mendoza gave you were Demerol.

A But it wasn't in addition.

Q I asked you is that so, did you tell us that?

A Yes, but I misunderstood.

Q You were what?

A I misunderstood. Not in addition. In place of.

THE COURT: Let me ask you this: Is my understanding correct that when the doctor injected you with the Demerol, that same day you never took any Demerol, but if you got any pain in between you would take a Demerol tablet?

THE COURT: Let me ask you this: Is my understanding correct that when the doctor injected you with the Demerol, that same day you never took any Demerol, but if you got any pain in between you would take a Demerol tablet?

THE WITNESS: No, not that often.

THE COURT: Never mind often or whatever.

THE WITNESS: Yes.

THE COURT: Whenever you got some pain you then took a tablet?

MR. REILLY: Well, your Honor, in relation to that question, it would seem to me that you are forcing an answer as to whenever she got a pain. That is not the fact and I don't think she's testified to that.

THE COURT: I think she said that whenever she got a pain she took Demerol. If the pain got intense and she couldn't stand it.

THE WITNESS: When the pain got intense, but I didn't take it all the time because --

THE COURT: Nobody is suggesting that you were eating it by the handfuls, but that in between if you got pain and it was intense you would then take a Demerol pill?

THE WITNESS: Yes.

THE COURT: That is what I thought she said in the beginning and I haven't heard anything different since.

MR. CULLEN: And I asked her in addition to that was Dr. Mendoza injecting her with needles containing Demerol.

THE COURT: She said that on occasions he did and she has already testified to that.

MR. REILLY: This has gone on for almost an hour and a half, your Honor, before lunch, after lunch.

THE COURT: No, it has not gone on a hour and a half but it has gone on about ten or fifteen minutes so let's get into some other area.

Q The day that they had you down in the physiotherapy area of the N.Y.U. people, when you were placed from your stretcher that they brought you down in onto the bed or hammock or whatever you want to call it, to put you into the Hubbard bath, were you reclining?

A Yes.

Q Were you completely horizontal or parallel to the ground or were you tilted in any fashion?

A I was completely flat. Completely level.

Q Did you have any pillow behind your head?

A No.

Q You were not seated?

A No.

Q Did you at any time before, during, or after the

bath in the Hubbard tank, raise yourself to a sitting position?

A No.

Q Did anyone raise you to a sitting position?

A No.

Q So at all times even to the time that the incident happened, you were completely prone and horizontal or parallel to the ground?

A That's right.

Q You had been down on other occasions to that area for the same bath?

A That's true.

Q In lying on your back, were you able to discern this control box that allegedly struck you?

A Yes. As you are laying flat, and you look up.

Q Looking up, and how high from your position on the stretcher was the control box?

A I don't know.

Q You were there how many times?

A I'm not sure, five, seven.

Q And in that five or seven times, did you have any occasion to notice the distance from the top of your body, as you lay, I assume on your back, the position of

this box that allegedly struck you?

MR. REILLY: May I object, if the Court pleases. In what positions did she see it? It could have been moving at all times.

THE COURT: I don't know. Up to the point here, she hasn't made any answer so we can't even have a point of departure, so I will allow a question whether she observed it at any of those times that she went down there, the position of it above the tank. That is all he is trying to find out at this time as I understand.

MR. REILLY: At what time?

THE COURT: Anytime.

MR. REILLY: All right.

THE COURT: At any time. Then you can determine if it was before she was put in, after she was put in, or during the time she was put in.

A Well, it is at different levels because when the hammock or --

Q Excuse me. The answer is it was at different levels?

A That's right.

Q You never operated a Hubbard tank yourself, did you?

A No.

Q Did you ever see this box that allegedly struck you in the neck?

A Yes.

Q Ever in motion like a pendulum?

A Yes.

Q In other words, it was without control of any man on duty and it swung back and forth?

A No, no.

Q What do you mean when you saw it in motion?

A One gentleman would move it while one gentleman would guide the stretcher over the tank.

Q One gentleman would move it? By that you mean the switch box?

A It can -- the whole cable or -- and the box moves in conjunction with the hammock to place you over the tank?

Q In other words, as the hammock moved, the overhead contraption moved?

A Yes.

Q Did the box move?

A Yes.

THE COURT: Wait a minute. She is talking about things which the jury probably has as much idea of as if they weren't here.

Q You were placed from the stretcher you were brought on into the stretcher which was going to put you in a tank?

A Right.

Q How many men lifted you?

A Two.

Q At the moment you were placed on the stretcher that was going to transport you into the tank, did you have an occasion to observe the mechanism that you were looking up at in the ceiling?

A Yes.

Q At that moment, how far was this control box from the highest point of your body as you lay prone on the stretcher? This is before any motion.

A I would say it was held about -- I have to demonstrate with my hand. I am trying to remember. About this far away from me.

THE COURT: Do it this way, the distance from your body.

A About this far away from here.

THE COURT: Just hold it there a minute although if you get tired you can put them down. Can we agree on the measurement?

MR. CULLEN: Two feet.

MR. REILLY: Whatever Mr. Cullen says.

THE COURT: All right, approximately two feet.

Q Do you know if this control box was rigid, set on a steel rod?

A It wasn't

Q Did you ever operate it yourself?

A No.

Q Did you ever actually see it bend in any fashion or sway or swing back and forth?

A Yes. Yes.

Q On what occasion?

A As they would -- well naturally -- as they would -- they'd push it and swing it.

Q They'd push what?

A The whole cable and the box.

Q One moment. The whole cable and the box. Let me show you Plaintiff's Exhibit 5. I refer you to the picture on the topmost part of the page.

A Right.

Q When you refer to the whole cable, what do you mean?

A I mean -- you see this extension? I call -- let's say it is an extension cord for want of a better word. The box here, that whole thing, don't forget

it's pliable.

Q What a minute.

MR. CULLEN: Move to strike that.

A All right, I am sorry. The whole thing can go back.

Q Do you mean that the whole stretcher ensemble?

A No.

Q Can move back and forth?

A Well, yes, that can move back and forth by operating buttons on the --

Q Control?

A The control on which they also glide but as they place you on the stretcher, a person holds this back.

Q That is the third person?

A Third person, yes. And you are slid by these two gentlemen on the stretcher because there is not too much space between these supports to slide in.

Q You are referring to what you have marked on there as "B"?

A Yes. There is not that much space between "A" and "B". Item "C" is not that long if you want to put it that way.

Q In other words, Miss Pavlicka, between "A" and

"B", "A: being the support from which the stretcher is suspended, and "B" being the stretcher itself, therer is not enough difference, as you say in room, to manipulate?

A You never --

Q Would you say the differance was about two feet?

A Roughly about two feet.

Q And you tell us that this takes a patient and within two feet of space between top of the support which holds up the stretcher and the stretcher itself, there is only two feet to get a person in there?

A No, I see -- let's call them cords or chains that hold the stretcher to the action above. They don't go -- they didn't go directly all the way up. They came this way and there was a chain, it was like an upside-down "Y". Instead of four going up on each side, it was two and then a "Y", upside-down "Y". You were never placed in a pool or tank sitting up. You were always placed in it laying down and you always, if you were going into the big pool, you were eased off and you were slid off.

Q You are speaking of September 13, 1968?

A That I stayed on the stretcher.

Q You didn't see anybody slide off?

A I said you were slid off, sir, when you were

going in the big pool.

MR. CULLEN: I move to strike it out. It is a conclusion on the part of the witness.

THE COURT: No, she is talking about another area. In the tank you are put in in this way. In some other thing you are slid in but we are not interested in the other thing at all. We are interested only in the one that you were in.

Q Two men took you from the stretcher which had transported you from your room, put you upon the stretcher which would dip you in the bath?

A That's correct.

Q There was another gentleman there, also, wasn't there?

A Yes.

Q So we have three gentlemen, and when this incident occurred, there was only one there, is that your contention?

A Yes, sir.

Q And two of them had in some unknown fashion disappeared?

MR. REILLY: I am going to object to the form.

THE COURT: That is a figurative way of speaking but two of them were not there.

Q Two of them weren't there.

A All right. Two of them weren't there.

Q And you testified on direct examination that something hit you, you weren't -- tell me again about that incident. When for the first tim did you see this object that allegedly hit you?

A I saw it comeing toward me about a second before impact.

Q Did you have any opportunity to avoid it?

A No, I turned my head.

Q Would you say it was a moment after this sight?

A A split second I saw it. I turned my head.

Q Do you know if it was the box?

A It was the box.

Q In other words, although it was a split second you had sufficient time to determine that it was a box?

A It was the control box, yet.

Q You had sufficient time to determine it was this control box. You got up to the service station, this is what you told us, you left the incident area where you were screaming and you felt you were blacking out and so forth, and you were now taken up to the service station.

THE COURT: The nurses' station.

Q The nurses' station.

A The nurses' station.

Q Did you give a statement to anybody at the station as to what occurred?

A Yes.

Q What did you tell them at the nurses' station? What did you tell them?

A I told them to the best of my recollection I was being -- I was being lifted out of the whirlpool tank. I vaguely recall the twelve o'clock bell sounding, and one fellow was guiding me and operating the controls, at the same time moving me over on the way from the tank.

I saw the control box swinging toward me. I turned my head. I got hit in the back of the head and back of the neck by the ear on the right side. I screamed. Things got black. I didn't pass out. I know I cried.

And there was some activity around me, but --

Q In other words you say the box long enough to turn your head?

A Yes.

THE COURT: We will take a five minute recess. Please don't discuss the case in the meantime.

(Recess)

(After recess)

MR. CULLEN: I have finished my cross.

MR. REILLY: I might forget a few things but I just want to hit a few things now, your Honor, and I think everybody wants to get home here.

THE COURT: But I want you to get finished with her because I don't want her to go home thinking she is going to be brought back on the stand all over the weekend. She is bugged enough as she is so don't bug her any more. Get finished with her today.

MR. REILLY: All right, fine.

MR. REILLY: I will stop on this, your Honor.

THE COURT: I am not suggesting anything except this: I do not want this woman recalled in this case on Monday. I expect both of you to be finished today. I am going to wait here until you are.

MR. REILLY: All that I am saying, your Honor, is that I have made notation of three different items. If during the weekend there is something --

THE COURT: No, no, I am not going to do that because I think she has gone through enough now. You are either going to conclude today or -- if, for example, a doctor says something that she wants to clarify later on, then I will allow her to be called but not on this direct and redirect case. Let's let her get through with this thing.

MR. REILLY: All right, your Honor. I might take a minute or two.

THE COURT: Take as much as you want. We are still here.

Q When you were asked, do you claim that the reconstruction of the eye was necessary and three different times that you had surgical intervention, was caused by the accident, can you answer that question?

THE COURT: No, I won't let her answer it.

THE COURT: We have run out of witnesses and, unfortunately, you have to go home.

You know what the woman said when the man retired. She said "Honey, I married you for better or for worse but no for lunch."

All right, please don't discuss this case amongst yourselves nor with anyone else nor form or express any opinion in this matter until it is submitted to you for your decision.

Please return back here on Monday morning at ten o'clock.

(Adjourned to Monday, 11/12/73, at 10:00 A.M.)

A As a matter of fact, I received a report first and she told me something when she was transferred in rehabilitation service, that is, when she was receiving physical therapy and during the transfer, a suspender, which she was sitting on it and something hanging on that suspender fell off and dropped on her neck, on the right side of her neck.

Q And you said before she told you you received a report from somebody?

A Yes.

Q Who was that who gave you the report?

A The floor nurse.

Q Do you know the name of the floor nurse?

A I don't.

Q Would that be in the record?

A It is possible. I am not quite sure.

Q What part of the record would that be in?

A The nurse's notes.

Q Would you look at the nurse's notes to see if you could find that?

THE COURT: What you just told us now, did you remember that in your own mind or is it written down there someplace?

THE WITNESS: I remember by myself.

MR. CULLEN: It is in the hospital record, part of the summary chart as provided by Miss Pavlicka. It should be on the doctor's summary chart which he had which I think we marked for identification.

Q Were you advised shortly before you operated on Miss Pavlicka by a report from John Hopkin's that in their opinion there was no fusion?

MR. CULLEN: Just one moment. This is not in evidence. The doctor has statements from various places. The admission of these doctors' opinions has been refused by the Court on the ground that these opinions submitted to the doctor was based upon hearsay.

THE COURT: That is right. That is what I ruled on Mr. Reilly's objection so if it is in that class, I naturally would have to rule the same way.

Doctor, this copy was in your file. Did that report come to you just before the hospitalization of 1968?

A Yes, sir.

THE COURT: What is the number?

MR. CULLEN: It is the doctor's office record.

THE CLERK: It is E, your Honor.

THE COURT: Mark it E-2.

(Defendant's Exhibit E-2 marked for identification.

THE COURT: What is the question?

(Read back)

THE COURT: He answered that question.

Q Does that report indicate that there was no fusion?

MR. CULLEN: Objection.

THE COURT: Sustained.

Q Did you receive a report from John Hopkin's?

A I don't recall offhand.

THE COURT: Are you making him your own witness in this area? Nothung about this has been brought out on direct examination. The point of the matter is, if you are going to try to get some opinion from him, he hasn't been asked one question on his opinion as to anything.

If you are going to do that, you are taking him on as your own witness and you are doing it on your own and I would suggest that you do it as part of your case and not as part of his case.

On this back injury, I don't know essentially what it has to do with our claim right here.

MR. REILLY: I think it is the whole picture.

THE COURT: That is something you want to bring out, you call him and produce him as your witness.

He has been asked about certain entries, what they meant and what medical terms meant.

MR. CULLEN: He has rested and anything now comes as rebuttal.

THE COURT: I am suggesting that to him and that is why I want to see if he wants to call him as his own witness in rebuttal, he can do it if he is trying to get opinions from him.

MR. REILLY: If the Court please, I am getting facts in relation to this woman's condition and in relation to the cause of pain.

THE COURT: It is not cross examination, that is what I am suggesting to you. It is something you have a right to bring out if you want to do it but not at this time. At this point you are cross examining him on things that were brought out during the examination by Mr. Cullen, period. Then if you want to call him for any reason, you have a right to do that, but he is your witness in that case.

Q During the course of the period when you saw her in 1966 up until April of 1972, did you refer Miss Pavlicka to various doctors?

A Yes sir.

Q During the period from '66 to '68, did you make such referrals?

Could you tell me the names of the doctors you referred her to?

A. As I recall there was only one doctor I referred her to relative to the operation of 1966. I referred her to Dr. Hoen and we operated on her together.

Subsequent to that, I don't recall. I would have to refresh my memory.

Q. Would you want to look at your records--

THE COURT: These negative questions really murder you. He has to go through the record all over again because he has no present recollection of this. If you want that, go ahead and do it, but a negative question like that-- if you know who they are, why don't you suggest it to him?

MR. REILLY: I don't know in view of the voluminous numbers.

THE COURT: Give it to him and let him go through with your negative questions which means he has to go through every single piece of paper to find out if he did or did not refer.

MR. REILLY: Your Honor, I am sorry that you are irritated at me.

THE CO URT: I will show on the record I am.

Here is a case where you have the doctor's records for three or four days and now for the first time you are starting to ask him questions and looking through the file to find out these things. You could have looked at each piece of paper and seen the doctor's name on there and said didn't you refer him to Dr. Chin, didn't you refer him to Dr. Moldaver and didn't you refer him to so and so. That is not what you are doing. I am irritated if you want to make a record and I know exactly what you are doing.

MR. REILLY: I apologize.

THE COURT: You don't have to apologize but please get on with this. These negative questions, it has happened about five times now. He has to look through every piece of paper in the record and there must be 50 or 55 sheets in there.

MR. REILLY: I understand that.

THE COURT: Give it to him and let's go through this one now.

The question is: who else did you refer him to except the one doctor you remember, Dr. Hoen?

THE COURT: Did you ever go into that physicther room?

THE WITNESS: Yes.

THE COURT: And you are familiar with the Hubbar bath?

THE WITNESS: Yes.

THE COURT: Are you familiar with the equipment above it?

THE WITNESS: Yes.

THE COURT: Essentially what it is like, four guide wires that are on a trolley that goes along a track, is that the way it is attached?

THE WITNESS: Yes, to a motor.

THE COURT: The mechanism. We are talking about your recollection what this mechanism looked like at the time in question, are we clear on that?

THE WITNESS: Yes.

THE COURT: That switch that caused the machine to run along the trolley and also to go up and down so there can be immersion, was that on some sort of a flexible wire?

THE WITNESS: Yes.

THE COURT: At the end of that flexible wire, there was this box?

THE WITNESS: Yes.

THE COURT: That had buttons for up and down and then along the trolley?

THE WITNESS: That is right.

THE COURT: Can you describe to the jury what you saw as far as that flexible wire is concerned from this viewpoint? Did that flexible wire move up and down so it changed the distance between the box and the bottom of the stretcher or was it a fixed wire that stayed in a same position?

THE WITNESS: I believe it was mounted on elastic so it could be hand held as the patient was raised up and brought to the Hubbard tank or pool and lowered in there. I believe it was on some sort of flexib cable.

THE COURT: That could be pulled down and pulled up?

THE WITNESS: Yes.

THE COURT: Could you pull it all the way down to the stretcher if you know?

THE WITNESS: I don't know.

THE COURT: If you saw a diagram of it in a hospital catalog, would that, do you think, help refresh your recollection?

THE WITNESS: It migh

THE COURT: Show him t[illegible] diagrams.

MR. CULLEN: This is Plaintiff's Exhibit 5.

THE COURT: The second page, we are describing a portion where the little box on a flexible wire is. Do you see that?

THE WITNESS: Yes.

THE COURT: Is that the way you visualize it as it is in that diagram?

THE WITNESS: Yes.

THE COURT: Indicating the box that is here, could that ever be brought down all the way to the stretcher?

THE WITNESS: No, not as it is here.

THE COURT: A witness testified something about two feet. Do you have any recollection about a distance of two feet as far as that box is concerned?

THE WITNESS: I would say about two feet above the stretcher would be correct. I remember seeing it in use and seeing it in that position.

THE COURT: And it couldn't go down any further as far as you know?

THE WITNESS: Not as far as I know.

THE COURT: So the jury can understand what we

are talking about, you remember this diagram and that switch is in here and if you look at it whenever you desire to do so, you will understand what he is talking about.

Any other questions of the doctor?

MR. REILLY: No further questions.

MR. CULLEN: No questions.

THE COURT: You may step down.

(Witness Excused)

THE COURT: I think we are back with the plaintiff's case.

MR. REILLY: The only thing that is left open if we could have some time, it has to do with the medical expenses.

THE COURT: I thought you had agreed on something

MR. CULLEN: We are talking about the bills.

THE COURT: I thought you had agreed.

MR. CULLEN: We are pretty well agreed. Perhaps we can do it outside the presence of the jury.

THE COURT: Tell me what you agreed, then we could tell the jury about it.

(At the side bar)

MR. CULLEN: We are subtracting the cost of the hospital from August 15th to September 13th. We are also from the prescriptions -- I understood you wanted

that is not very intricate as far as the facts are concerned, but the medical testimony was quite extensive and although Mr. Reilly got to the point where he thought I got irritated, actually I want to thank the lawyers, too, because they did point up these areas to you and maybe it had been done once or twice or three times but there is nothing wrong with that because it is an elementary principle of teaching, you can't learn anything when you hear it the first time, it must be told to you more than once and in different ways.

So I do thank the lawyers for helping me. From time to time they came to the side bar as you recall and we discussed matters of law, and I want to thank them also on your behalf because I think you are persuaded as I am that they acted though there appeared to be some acrimony, it appears it was only professional acrimony and nothing more.

I told the lawyers yesterday what I was going to say today, and in fact I made myself an idiot card. I wrote it on the board so they would know exactly what I was going to say, but I started off with the facts and I indicated to them since the facts were essentially of such a limited nature as far as the incident was concerned, that I wasn't going to say anything about the facts

particularly, I would leave that up to them and they have covered the facts and you are familiar with them.

I may mention some facts from time to time but it is only to indicate to you the manner in which the law is applied. My recollection of the facts doesn't bind you any more than lawyers' recollection of the facts.

You will use your own judgment on that and your own recollection.

When you analyze the facts, you quickly come to the conclusion that there are very many areas here that both sides agree upon.

They agree, for example, she was in the hospital. They agree she had this operation. They agree that prior to that she had this unfortunate bout with diptheria, she lost an eye and they agree on many things, but there are two areas in which I would use the term advisedly violently disagree. The first is th question of whether or not there is responsibility here for this. Is this the tort which is described as a civil wrong for which there is a remedy in law.

The hospital says no and the plaintiff, of course says yes, and this conclusion comes from facts that they consider in coming to this conclusion.

In this regard there may be more than one proximate cause and if there is, each of them is a competent producting cause. In other words, it doesn't have to be entirely produced by one person. This becomes relevant in this case because if you recall, the second element in here was that she contributed to the happening of the accident and, if so, she could not recover and that was because she was also a proximate cause of the injury if you so find after going over the facts, did she do anything to bring this accident about.

You will recall how she testified on the stand and how she described this happening. You have a right to look at any of the evidence to see how the equipment looks and how it operates and what not from the evidence in the case and you will have to determine whether or not she in any way contributed to this.

In order to look into this part of the matter, I will indicate to you what contributory negligence is, how it is described in the law.

Under the law, the plaintiff was required to exercise reasonable care for her own safety. That is, the same degree of care that a reasonably prudent person would have exercised for her safety under the same conditions.

The law does not permit you to weigh the degree of fault of the plaintiff and a defendant but requires that if you find that the plaintiff was guilty of any negligence, your verdict must be for the defendant even though you find that the defendant was also guilty of negligence.

If, however, you find that the plaintiff did exercise reasonable care under the circumstances and you find that she acted under the time and place and circumstances of the particular incident in a reasonably prodent fashion, then she would be free of negligence and if you find then that the defendant was at fault, you would, of course, find that they would be responsible for it.

So here again you must look into proximate cause because if you find there was negligence on her part, for the sake of argument, suppose in a situation like this you find, and I don't suggest you must and I am only discussing the evidence generally and not in particular importance.

Suppose for the sake of argument you remember she is sitting back in the chair showing you how it happened and she said it came from her right and turned her head around and it hit her head.

Suppose for the sake of argument she sat up into this device. That, of course, would be her own conduct.

She had been there five or six times before. She knew how the thing worked. She knew what she was supposed to do according to what she said about having been there and she remembers it as being prone on her back at all times.

I will not go into any detail in this area because I will have you rely on the argument made by counsel. You heard the intensive argument made in front of you and you can do anything you remember of the facts in this case.

I only made the remarks to you to indicate what we mean by contributory negligence where a person adds to or becomes part of the fault.

(At the side bar)

THE COURT: Note your exceptions.

MR. REILLY: In an example the Court gave as to the description that she testified to, you indicated it could have been something different such as sitting up and the indication that I got, there was no testimony in there in that respect at all and was speculative and I got the further indication that giving them this example would make them think if she did this, this was contributory negligence.

THE COURT: Since you made the statement, I indicate that the record indicates clearly to me that from the doctor's description and description of the girl who came in with the record and supplied the photograph here that under no circumstances could this particular part of the device hit her since it was at least two feet away from her and there would have to be some other way in which this happened and I only suggested to the jury in looking into the evidence, they might consider anything that was likely to happen, an inference that could be drawn from the attempt and that is all. I didn't suggest to them that it did happen.

Any other exceptions?

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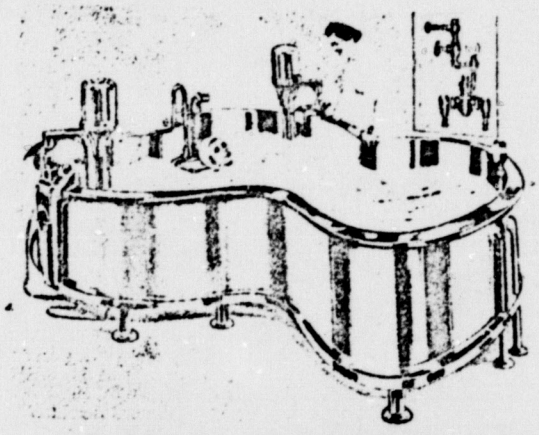
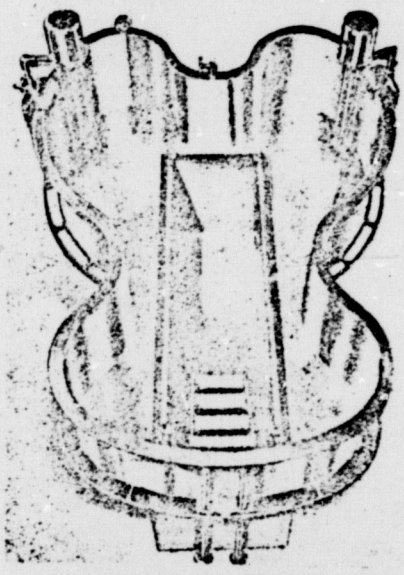
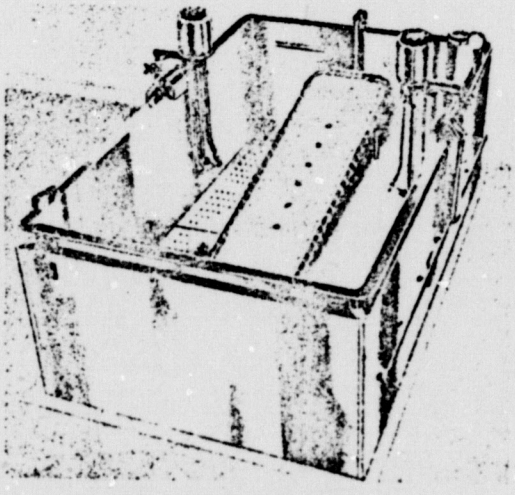


PC 3710 - FULL BODY IMMERSION HYDROTHERAPY TANK



PC 3712 - COMBINATION TREATMENT & WADING TANK



PC 3714 - WADING and UNDERWATER EXERCISE TANK

PC 3710—ILLE FULL BODY IMMERSION HYDROTHERAPY TANK — Consisting of a heavy 14-gauge Stainless Steel Tank seamlessly welded, two Electric Turbine Ejectors, two Turbine Ejector Carriages, two Turbine Ejector Elevators, 3½" Dial Thermometer for tank, Tank Fittings, Head Rest, Body Hammock, Body Plinth, and steel base supported by chromium plated legs. Over all dimensions 8'-10" x 6'-6" x 34" high. Inside measurements of tank: 7'-2" long x 6' wide (head end) 4'-5" wide (foot end) 35" wide (middle inset) x 22" deep **$3665.00**

PC 3710A THERMOSTATIC WATER MIXING VALVE ASSEMBLY — 45 gallon per minute capacity **$395.00**

PC 3710B OVERHEAD CARRIER — Consisting of an Electric Hoist and Trolley, Water Stretcher with two Canvas, Cross Bar and Suspensions, and two Canvas Body Slings **$565.00**

PC 3710CPL COMPLETE UNIT, includes PC 3710, PC 3710A and PC 3710B. **$4625.00**

PC 3712—ILLE COMBINATION TREATMENT AND WADING HYDROTHERAPY TANK UNIT — Consisting of a heavy 14-gauge Stainless Steel Tank with Wading Trough seamlessly welded, two Electric Turbine Ejectors, two Turbine Ejector Carriages, two Turbine Ejector Elevators, 3½" Dial Thermometer for tank, Tank Water Inlet and Drain Fittings, Head Rest, Body Hammock, Body Plinth, two adjustable Hand Rails for wading trough, Stainless Steel Steps for trough, and two removable Stainless Steel Trough Covers. Measurements: Same as PC 3710; depth of wading trough 32" **$5075.00**

PC 3712A THERMOSTATIC WATER MIXING VALVE ASSEMBLY — 125 gallon per minute capacity **$530.00**

PC 3712B OVERHEAD CARRIER consisting of an Electric Hoist and Trolley, Water Stretcher with two Canvas, Cross Bar and Suspensions, two Canvas Body Slings and Body Suspension Wading Harness **$615.00**

PC 3712CPL COMPLETE UNIT. Includes PC 3712, PC 3712A and PC 3712B **$6220.00**

PC 3716—WALL RECESS CABINET, without door, for mounting Mixing Valve, optional **$140.00**

PC 3714—WADING AND UNDERWATER EXERCISE TANK— Consists of a stainless steel double wall tank, two sets adjustable handrails, water inlet, overflow and drain fittings including hand operated 3-inch drain valve, stainless steel steps, two electric turbine ejectors and aerators with turbine carriages and elevators, dial thermometer in tank, adjustable head rest with two canvas, body hammock with two canvas, body plinth with two canvas, plinth supporting fixture; Thermostatic Water Mixing Valve Assembly, and Overhead Carrier consisting of electric hoist and trolley, stainless steel water stretcher with two canvas, stainless steel cross bar with suspensions and snap-hooks, two canvas body slings and a body suspension wading harness. Over-all dimensions 8'-11" long x 5'-5" wide. Inside tank dimensions are 8'-6" long x 5' wide, 54" adult depth one side and 32" child depth other side **$8000.00**

Note: Tank size may be varied, dependent upon hospital requirements and room size.

ILLE HUBBARD TANK ACCESSORIES

PC 3720—**Body Plinth*** (Figure 6) **$106.00**

PC 3721—**Adj. Mounting Fixture** for Body Plinth (7) **54.00**

PC 3722—**Attachment For Electric Hoist** — Consisting of cross-bar with eye hook and suspension including snap hooks (2) **98.00**

PC 3723—**Water Stretcher** with 2 canvas (3) **106.00**

PC 3724—Same, but with 1 canvas only **89.20**

PC 3725—Same, but with 2 nylon canvas **143.00**

PC 3728—**Adj. Body Hammock** with 2 brackets* (5) **35.30**

PC 3729—**Headrest** — Gooseneck & arms* (8) **59.50**

PC 3730—**Headrest Mounting Fixture** **37.85**

PC 3732—**Overhead Electric Hoist** — Capacity 500 lbs. Equipped with ¼ h.p. instantly reversible motor; automatic safety stops, double brakes (1) **355.00**

PC 3733—**"I" Beam Trolley** — Fits "I" beam sizes 4" to 10" **35.00**

PC 3734—**Wading Harness**, Complete **97.00**

PC 3735—**Electric Turbine Ejector** **250.00**

PC 3736—**Turbine Carriage with Elevator** **248.25**

*Price includes two canvases

ILLE REPLACEMENT CANVAS

PC 3738—Body Plinth Canvas & lacing, 63½" x 17½" **$19.00**

PC 3739—Water Stretcher Canvas & lacing, 63½" x 17½" **19.00**

PC 3740—Water Stretcher Nylon Canvas 63½" x 17½" **28.60**

PC 3741—Same — with nylon string 63½" x 17½" **35.70**

PC 3743—Body Hammock Canvas 36" x 12" **9.50**

PC 3744—Body Sling Canvas (Fig. 4) 39½" x 15" **7.75**

PC 3745—Headrest Canvas 15" x 5¾" **4.85**

PC 3746—Wading Harness Canvas, set of 2 **20.75**

Note: For special size replacement canvases, please specify exact size when ordering.

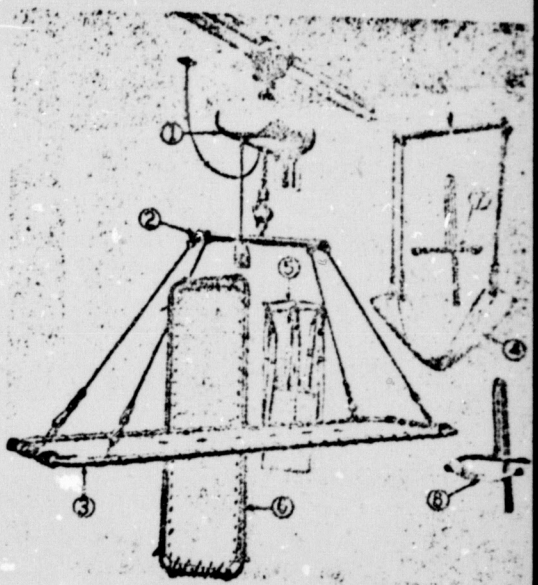
POOL ACCESSORIES

PC 3737—**STAINLESS STEEL POOL CHAIR** — Consists of a heavy-gauge, fully welded all stainless steel chair with backrest and 4 adjustable legs. Includes 2 canvas restraining straps with buckles. Height adjustable from 20" to 30" **$200.00**

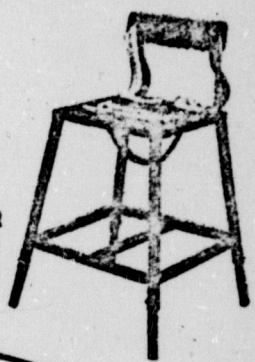
PC 3747—**POOL PARALLEL BAR** — Consisting of a stainless steel base with vinyl mat and two sets of Parallel Bars adjustable in height and width. Hand rails are 12'-8" long. One "A" frame furnished for use in lifting the stainless steel base by using the overhead electric hoist. Base is 13'6" long x 26" wide with vertical upright supporting columns. Fixtures constructed of brass or bronze, polished chrome **$1650.00**

PC 3748—**OVERHEAD CARRIER FOR POOL** — Consisting of electric hoist with 15 ft. load chain, chain container and insulated safety hook, Hoist Trolley for "I" Beam, Cross Bar and Suspensions, stainless steel Water Stretcher with two (2) removable Canvas and Lacing String and two Body Sling Canvas **$565.00**

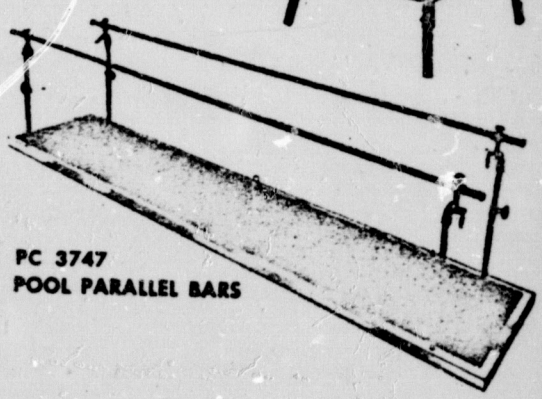
PC 3749—**POOL TREATMENT TABLE** — Stainless steel, with four adjustable legs fabricated of heavy gauge, fully welded 18-8 stainless steel and perforated stainless steel top. Three canvas restraining straps with buckles attach to top of table. Table is adjustable in height from 32" to 42". Table top is 78" long x 30" wide **$460.00**



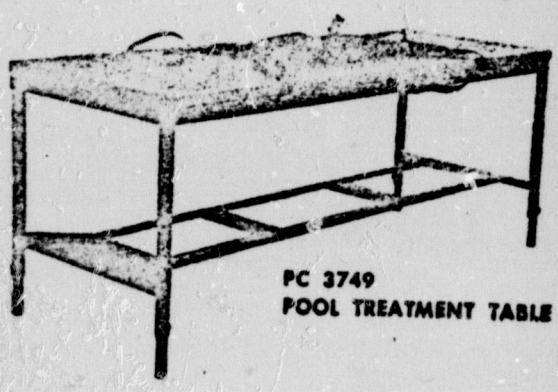
ILLE HUBBARD TANK ACCESSORIES



PC 3737
POOL CHAIR



PC 3747
POOL PARALLEL BARS



PC 3749
POOL TREATMENT TABLE